U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: July 26, 2001

Case No.: 1999-INA-276
CO No.: P1996-CA-09047500

In the Matter of:

OCEANLAND SERVICE, INC.,
Employer,

on behalf of:

SU-CHI WU,
Alien.

Appearance: Yee-Jen Shuai
for Employer and Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Burke, Vittone and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Su-Chi Wu ("Alien") filed by Oceanland Service, Inc. ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor at San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.[1]

[1] In this decision, "(AF)" indicates a citation to the Appeal File.

Under section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States' workers similarly employed.

Statement of the Case

On August 28, 1995, Employer applied for alien employment certification on behalf of the Alien to fill the position of "Export/Import Specialist (Bi-Lingual)" in its Import/Export and International Transportation Business. The position was classified as a "Manager, Export" under DOT Occupational Code No. 163.117-014. (AF 447). Employer described the job duties as follows:

> Directs export/import activities; corresponds, meets and negotiates with foreign exporters/importers; corresponds with customs brokers; clears imports through customs, coordinates activities of international traffic division; negotiates settlements with foreign and domestic shippers; plans and directs flow of air and surface traffic moving to oversea destinations and also within the U.S.

(AF 447, box 13).

Employer's job offer was for a forty hour a week job from 8:30 AM to 5:30 PM. (*Id.*, boxes 10-12). The Employer stated no educational requirement, but required two years of experience in the job offered or in the related occupation of Import/Export Clerk. The other special requirements were that the worker "Must speak, read and write Mandarin Chinese. (50% of work-time worker will be using Chinese Language, since more than 60% of our customers are Mandarin speaking)." (*Id.*, boxes 14-15).

Notice of Findings. On June 29, 1998, the CO issued a Notice of Findings ("NOF"), proposing to deny certification, subject to rebuttal by Employer (AF 442-445). The NOF said the foreign language specification in Employer's job requirements was unduly restrictive in violation of 20 CFR §656.21(b)(2)(i)(C). The NOF also said that Employer rejected U.S. workers Chen, Stampfli, and Benson for reasons that were neither lawful nor job-related in violation of 20 CFR §656.21(b)(6) and §§656.21(j)(1)(iii) and (iv) and that Employer did not make a good faith effort to contact U.S. worker Kwan in violation of 20 CFR §656.20(c)(8).

Rebuttal. On July 31, 1998, Employer filed a rebuttal (AF 429-441). The rebuttal consisted of a letter from Employer's Vice President, and several Exhibits consisting of telephone

invoices, and business documents.[2] The rebuttal cited Exh. E and said Ms. Chen was rejected because she lacked the required experience of two years as an Import/Export Clerk and because she lacked the ability to write in Chinese. The Vice President said she did contact Mr. Stampfli, citing phone bills in Exhibit F in support of this assertion. She said Mr. Stampfli was not hired because he could not write or speak Chinese. The Vice President said she did contact Ms. Benson, once again citing the phone bill in Exh. G. This worker was not hired because she was currently working for her own international trading business as well as part time for another international trade firm, and Employer was unwilling to hire an employee engaged in an ongoing competitive business that represented a present or anticipated conflict of interest. Finally, Employer said Ms. Kwan was contacted and interviewed. During the interview, Employer determined that this applicant evinced insufficient interest in the job offered and thereby rejected her.

Final Determination. On March 9, 1999, the CO issued a Final Determination ("FD") in which certification was denied (AF 427-428). The CO did not discuss the unduly restrictive job requirement/business issue, but denied certification solely on the grounds that Employer failed to assess fully the applicants' backgrounds, thereby failing to give valid, job-related reasons for rejection, and failed to conduct a good-faith recruiting effort. The CO wrote:

> NOF indicated you had not given valid, job-related reasons for rejecting three applicants and not demonstrated a good-faith effort to recruit another. You rebut by iterating your reasons for rejection and submitting some telephone bills.
>
> 1> You state you had a telephone interview with CHEN on February 28 but the telephone bill you submit to show this conversation is for March 1 and for only a one-minute conversation; we don't see how you could fully evaluate this apparently qualified applicant's background in only one minute.
>
> You submit a bill showing two conversations with STAMPLI on February 28, one for 18 seconds, the other for four-and-a-half minutes. Again, we fail to see how you could fully assess this applicant's background in so brief a time.
>
> BENSON also reports no contact with you. You report a 16 1/2 minute conversation with her, but we note that the telephone bill shows you called from a number entirely different than you give in box 5 of the ETA750A; that number is listed to a person (Ping Lu) not identified as a member of your staff. And your statement about how BENSON was employed by competitors raises the issue of how any U.S. worker could qualify for this position since you would see their qualifying experience in the industry to be competitive.

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[2]As the Appellate File pages were numbered in a sequence that is inconsistent with the contents of the letter by Employer's Vice President, the Panel takes note that Employer's rebuttal exhibits A, B, C, and D are found at AF 11-426 in the record.

There is room for doubt these applicants had their backgrounds fully assessed and that you give them valid, job-related reasons for rejection.

2> You report you have no telephone bill and cannot present other evidence you interviewed KWAN. You state that she "gave [you] her business card" but this is not positive evidence: we notice several of the staple holes on the card match those at the top of her resume (indicating to us she sent you her card stapled to her resume). KWAN's questionnaire response [that] she did not have contact with you combined with similar responses from other qualified applicants referred to earlier in this determination indicate to us you have not given substantial evidence of a good-faith effort to recruit U.S. applicants.

(AF 428).

Appeal. On April 9, 1999, Employer requested that the CO reconsider the denial of certification and refer the matter to the Board if reconsideration were denied. Employer attached a sworn statement by its Vice President to the motion. The CO did not rule on the request for reconsideration, but referred the Appellate File to BALCA for administrative/judicial review (AF 1-10).

Discussion

I. Record for Review; New Evidence Attached to Motion for Reconsideration

The Final Determination raises factual issues for the first time concerning the credibility of Employer's proof of contact of applicants.[3] The Employer's Vice-President declaration, which was attached to Employer's motion for reconsideration/request for Board review, addresses these new issues of fact and clarifies or repeats information previously supplied in the rebuttal.

Where an employer did not have a prior opportunity to present evidence to support its position, a CO abuses his or her discretion in not reconsidering. Harry Tancredi, 1988-INA- 441 (Dec. 1, 1988) (*en banc*). In the instant case, the CO did not rule on the motion for reconsideration. Accordingly, the Board will consider the new evidence to be part of the record for review. Royal Antique Rugs, Inc., 1990-INA-529 (Oct. 30, 1991); Lee Baron Fashions, Inc., 1989-INA-263 (Apr. 22, 1991)

II. Waiver of unduly restrictive job requirement/business necessity issue

Employer is found to have successfully rebutted the issue relating to Employer's failure to

[3] Compare Austin Grills, Inc., 1997-INA-350 (May 5, 1998) (CO did not raise new issues but was just expounding upon those originally raised in the NOF; Final Determination "merely reflect[ed] fair analyses and commentary upon the rebuttal evidence submitted by employer.").

prove a business necessity for its restrictive requirement of fluency in Mandarin Chinese because the CO did not cite the restrictive requirement in the Final Determination as a ground for denial of labor certification. (AF 427-428). An assertion made in the NOF, responded to in Rebuttal, and not repeated in the Final Determination, is deemed to be successfully rebutted and thus not an issue before the Board. Barbara Harris, 1988-INA-392 (Apr. 5, 1989) (en banc), citing 20 C.F.R. §656.25(g)(2)(ii) (1988).

III. Lack of Good Faith in Contact/Evaluation of U.S. Applicants

The Final Determination is primarily based on the conclusion that Employer's proof of contact of U.S. applicants left "room for doubt" whether Employer had made only a cursory examination of applicants' qualifications for the job. We find Employer's proof and explanations, however, to have rebutted successfully the NOF and the new issues raised in the Final Determination.

a. Applicant Chen

The CO discredited Employer's statement that it interviewed applicant Chen on February 28 on the ground that the telephone bill presented by Employer showed that the telephone contact took place on March 1, and only lasted one minute – an inadequate time to evaluate an applicant.

Employer's Vice-President declared that she personally called applicant Chen on March 1, 1996 and being told that the applicant was not home, left a message requesting that the applicant call her back; that the applicant in fact did call back; that in the conversation the applicant's qualifications were discussed; that she learned that the applicant could speak, but not write Mandarin Chinese, and that the applicant did not have the required two years of experience as an import/export clerk. (AF 8)

We find that Employer's explanation is credible, and that since the applicant did not meet two of Employer's job requirements, she was lawfully rejected.

b. Applicant Stampfli

The CO found that Employer had not adequately evaluated the credentials of applicant Stampfli because the telephone bill presented by Employer showed that the telephone contacts only lasted 18 seconds and 4 1/2 minutes.

Employer's Vice-President declared that she had a telephone conversation with applicant Stampfli, and learned that he could not read or write Chinese. (AF 8)

We find that the telephone records showing a 4 1/2 minute telephone conversation shows adequate time for Employer to learn that the applicant could not read or write Chinese, and therefore, did not meet one of Employer's job requirements.

c. Applicant Benson

The CO discredited Employer's evidence of contact with applicant Benson on the ground that the applicant had answered a questionnaire, reporting no contact from Employer -- and on the ground that the telephone bill presented by Employer showing a 16 1/2 minute conversation showed that the call was made from a number different than the one shown on the ETA 750A and from a person not identified as a member of Employer's staff.

Employer's Vice-President declared that she had a long telephone conversation with applicant Benson, discussing the applicant's business interests; that she found that the applicant was not available as a full-time employee and had a potential conflict of interest; that the person identified on the phone records is a personnel manager employed by Employer; that Employer had 13 phone lines, 5 fax lines, and 5 PBX trunk lines, and that the declarant used one of the trunk lines to make the phone call to the applicant; that Exhibit A shows the phone call; that Employer still uses the phone line in question as shown by a more recent phone bill; that the personnel manager is the contact person if Pacific Bell needs to contact Employer regarding the phone bills; that Exhibit C shows a canceled check used to pay the bill for the phone line in question. (AF 8-9)

Employer's attorney argued that the CO's denial of labor certification without giving Employer an opportunity to clarify the misunderstanding about the phone line was arbitrary. (AF 3) Employer's attorney also argued that the ground for rejection of applicant Benson was lawful, first because the applicant was the Owner, not the employee, of a competing business, and second because the applicant expressed the possible need to take leaves of absence, while Employer needed a full-time employee. (AF 5)

We find that Employer's documented explanation for the discrepancy in the phone numbers successfully establishes that Employer contacted the applicant, and had a 16 1/2 minute interview (evidence that the CO never considered because she ignored Employer's motion for reconsideration).[4] We also find that applicant Benson was rejected for lawful, job-related reasons. Specifically, in regard to applicant Benson, the CO stated: "And your statement about how BENSON was employed by competitors raises the issue of how any U.S. worker could qualify for this position since you would see their qualifying experience in the industry to be competitive." This is a mis-characterization of Employer's explanation of its rejection of applicant Benson. Employer states that Ms. Benson expressed a desire to maintain her own import/export business on the side. This was unacceptable to Employer because (1) they did not seek to employ a part-time employee, and (2) an employee who maintains her own trading business would have a potential conflict-in-interest and would be in a position to provide confidential information from

[4] We observe that the phone statements submitted as part of the rebuttal have Employer's name printed on them and clearly indicate that the number used was a trunk line. Moreover, the calls to Ms. Chen and Mr. Stampfli were also made from phone numbers different from the one listed on the ETA form. (AF 434-441).

clients and customers to competitors and thereby expose Employer to liability for damages. Thus, Employer did not reject applicant Benson for being employed by competitors, but for expressing the intention to continue her own, potentially competing business while employed for Employer. An employer may lawfully reject an applicant who intends to maintain a competing business and who wishes to take time off work to promote that business. Compare Production Tool Corp. of Wisconsin, 1988-INA-210 (Nov. 9, 1989) (employer lawfully rejected a U.S. worker who intended to keep his other, higher paying full-time job while also working for the employer).

d. Applicant Kwan

The CO expressed doubt about Employer's contact with applicant Kwan on the grounds (1) that Employer did not have a telephone bill to show that a telephone call had been made, (2) that Employer's statement that it obtained a business card from the applicant was not credible because staple holes on the card appeared to match staple holes on the applicant's resume (suggesting that Employer obtained the card from the resume and not during an interview), (3) that the applicant indicated in answer to a DOL questionnaire that Employer had not contacted her, and (4) that the applicant's denial of contact on the questionnaire was consistent with questionnaire responses by other applicants.

Employer's Vice-President declared that she personally called applicant Kwan and set up an interview; that applicant Kwan in fact did come to the office where she was interviewed by the declarant; that the duties and benefits of the job were discussed, as were the applicant's background and interests; that the applicant stated that she was looking for a more challenging job; and that the applicant provided a business card that was attached to the rebuttal to the NOF. (AF 7) Employer's attorney argued that the CO cannot arbitrarily determine that an applicant's statement is correct and trustworthy and an employer's statement inherently not reliable and probative, citing A & R, 1990-INA-344 (Oct. 31, 1991), citing Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980). The attorney also argued that the alleged consistency of denials of contact by other applicants was undermined by the fact that Employer had proved contact with all of the other applicants.

We find that the reason stated by the CO in the Final Determination for rejection of Employer's statements in regard to applicant Kwan is not adequately supported by the record. Due to the staple marks on the card, the CO questioned whether applicant Kwan actually gave her business card to Employer or whether Employer removed the card from the resume it had initially received. Of course, the card could have been stapled to the resume after the interview. In her cover letter, Ms. Kwan did not mention an enclosed card. Even if Employer did remove the card, it is clear from the phone statements and applicant Kwan's resume that a telephone record would not exist because they are located in the same city. (AF 434-441, 462).

The CO also indicated that applicant Kwan replied on the DOL's questionnaire that Employer never contacted her. (AF 428). However, Ms. Benson replied similarly on the questionnaire even though there is evidence demonstrating otherwise. A narrative account of

interviews by an employer may carry more credibility than bare assertions on a questionnaire obtained months later.[5] In this case, Employer provided an account of contact with applicant Kwan by its Vice President in its rejection letter to her and in both the rebuttal and Motion for Reconsideration. Under these circumstances, we find that applicant Kwan's questionnaire is outweighed by other evidence of record, and thus, is not a sufficient basis for denying certification. See Cathay Carpet Mills, Inc., 1987-INA-161 (Dec. 7, 1988). Therefore, in light of the impossibility of Employer submitting a telephone record of its call to set up an interview with applicant Kwan, we credit Employer's account of the interview.

IV. Conclusion

We find that Employer successfully rebutted each of the reasons for denial of labor certification preserved by the CO in the Final Determination. Accordingly, we remand this case for the CO to issue the labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and this matter is remanded for the CO to issue a labor certification.

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk

[5] In the instant case, the interview allegedly occurred on March 11, 1996 and memorialized in Employer's post-interview letter dated March 15, 1996, whereas applicant Kwan's questionnaire response is dated August 22, 1996. (AF 458)

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.